No. 3721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY (a corporation),
Appellant,

vs.

FORD MOTOR COMPANY, OF CANADA, LTD. (a corporation) and ROBERT NETTLEFOLD,
Appellees.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

BRIEF FOR APPELLEES IN REPLY TO REPLY BRIEF FOR APPELLANT.

W. F. WILLIAMSON,
Proctor for Appellees.

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In our former brief we presented a detailed statement of the case. We felt called upon to do so because, though Appellant's Brief quoted extensively from the correspondence, although not connectedly or always exactly it was wholly inadequate to give the Court an understanding of the case involved on this appeal. Appellant's oral argument was devoted entirely to comment upon some of the

correspondence, but in its Reply Brief, appellant has developed arguments differing somewhat from those advanced in the trial Court or in the brief originally filed on appellant's behalf. We shall, therefore, avail ourselves of the permission of the Court to reply as briefly as possible to the new matter presented in the Reply Brief for Appellant. Before doing so, we shall answer the criticisms upon our statement of the case. Happily, these criticisms are few in number and might be considered unimportant except that proctor for respondent in stating the case, was mindful of his duty to the Court to state the facts with exact fairness, and is ready to sustain such statements whenever their correctness is challenged. In this brief we shall endeavor to collect and consider, under appropriate headings, all statements and arguments of proctor referring to the several subjects discussed so as to avoid needless repetition. Our page references, unless otherwise indicated, are to the pages of the Apostles on Appeal.

1. Appellant's first objection is that the statement on page 4 of Respondent's Brief, that "on May 1st, 1916, respondent wired Ford Motor Company at San Francisco, that 5658 tons would be sent forward for shipment under this contract" is not supported by the record. We cite page 283 of the Apostles on Appeal from which we quote an acknowledgment of the wire referred to as follows:

> "On May 1st, we received your wire in which you advised there were 1316 cars in all and

based on the measurement of approximately 4.3 each would make a total of 5658 tons. This leaves only a difference of 542 tons for which we have signed contract with Henry W. Peabody & Company.''

These figures total 6200 tons, the full contract requirement. The fact that 542 tons only were contracted for with Peabody & Company, and neither more nor less, indicates that at the date of the Peabody contract—May 12th—respondent believed that it had available, or had procured, cargo for the entire 6200 tons space. This circumstance has an important bearing also on the statement, or the insinuation, of appellant, that respondent had, by reason of some more favorable freighting agreements, made it impossible to perform under this contract. When the 1316 cars referred to in the telegram of May 1st, were packed and shipped it was found that the tonnage, measured and weighed in the ratio required by the contract, was somewhat less than had been estimated by respondent's San Francisco agent. It, therefore, developed that the 542 tons of freight procured from Peabody & Company did not satisfy respondent's cargo requirements and, therefore, respondent's statement that this shortage was discovered after May 1st, is entirely correct.

2. Answer to the charge that respondent made other contracts for a portion of its tonnage in bad faith or in violation of its contract.

Libelant's Reply Brief contains many references to this charge. It is generally claimed that the

making of such a contract had rendered it impossible for respondent to perform the contract sued upon. In some instances it is argued that this amounted to an actual breach of the contract. In others, that it constituted an anticipatory breach. Finally, it is urged that it was both an actual and an anticipatory breach committed by respondent in self-interest and with utter indifference to its contract obligations.

As we shall show, the contract complained of was made within a month of the execution of the agreement sued upon, and before respondent had received that agreement or was fully advised of its terms. A contract so made months before performance of the contract here involved would, by any possibility, become due or before performance was asked, could not in the nature of things be an anticipatory breach inasmuch as respondent when it made the new contract did not know that the agreement sued upon in this action was effective (316, 276). There was no notice of breach or renunciation. Furthermore the making of such a contract did not render respondent unable to perform the agreement sued upon, though without such contract the cargo therein contracted for would have been sent forward for movement on the Cacique or other vessels moving out of San Francisco. There was a known basis, as the facts cited by libelant shows, on which the equivalent or a greater tonnage was obtainable from the Union Steamship Company, and there was always the possibility, by arrangements such as that

made with Peabody & Co., of supplying any shortage in cargo when delivery thereof should become due.

There remains only the charge or insinuation that respondent in disregard of its agreement sold some of its freight to another carrier because of a more advantageous rate. If this fact were true it would be material only if respondent thereby breached its agreement, which we have shown was not the case. Respondent was not prohibited by reason of the making of the contract sued upon from contracting for earlier movement of other cargo. There was no necessary relation between the two transactions and respondent would be liable as for a breach of the present contract, whether or not it had made another contract.

However immaterial in effect, we cannot allow to pass unanswered the charge that respondent sold some of its cargo to another carrier because of a more favorable rate, nor the intimation that respondent was indifferent to its contract obligations. Appellant's statement that "respondent yielded to the temptation of giving a part of the cargo to the cheaper carrier, etc.," is answered by the letters to which appellant refers. This only goes to show the evil of quoting detached sentences from letters without references to context or subject-matter. The matter first quoted has no reference whatever to this subject. It refers only to the Peabody contract of May 12th. The passage next quoted is preceded in the record by the following, which libelant

did not quote: "We are sorry we did not know the existence of this contract. It has never been received at this office. Had we had it we would never have made certain space engagements", etc. (276, 316). Upon the trial it clearly appeared from the evidence introduced by libelant, that the contract in question was lost in the mails, with the result that until a copy thereof was forwarded about April 3rd, respondent had no definite knowledge as to all of its details, or that the contract was firm (276, 288). Respondent's letter of May 25th to its San Francisco agent in this connection, states:

> "For a considerable length of time we did not know what if any arrangements you had made with the owners of the 'Cacique'. During this time we entered into negotiations for the forwarding of cargoes on the steamships Whakatane and Pakeha. We would not have accepted these arrangements had we known your arrangements were completed.
>
> You will further recollect that the contract you signed did not carry through to us and it was not until we received a copy of this contract that we really knew the details of this transaction in their entirety." (287)

It is thus apparent that the contract so unfavorably and unfairly commented upon by appellant, was made sometime between February 25th, the date of libelant's contract, and March 28th, which was before the copy of the contract reached respondent's office. In any event, as explained by respondent to its agent, the contract was made in ignorance of the fact that the arrangement with appellant

had been completed. This evidence was introduced by libelant. It is a sufficient answer to appellant's present claim, that respondent acted unfairly or from self-interest or with indifference to its contract obligations, and proctor for appellant should not have permitted his zeal for his client's cause to induce a statement or insinuation in conflict with facts so clearly established.

3. The attempted borrowing of 1500 tons from Union Steamship Company—the facts and significance of this circumstance.

The facts in this connection were correctly stated on pp. 4 and 5 of Brief for Appellees and are not questioned. Appellant in its Reply Brief, however, has attempted to draw some inferences therefrom, favorable to libelant's present contentions.

That respondent, on and after May 25th, 1916, intended to and was endeavoring to supply the full 6200 tons of freight on the assumption that the same would be loaded and shipped in June, is made very clear by respondent's letter of May 25th, addressed to its San Francisco agent, in which, after clearing up the confusion in the correspondence due to the loss of the contract, respondent directs its agent to borrow 1500 tons from the cargo, previously forwarded for the Union Steamship Company's steamers, which it was thought could be readily done inasmuch as several vessels of the latter company had been commandeered, and it appeared that there might be some delay on the Union Steamship Com-

pany's part in moving its freight. Respondent's agent in San Francisco was also directed in the same letter to sublet any short space (288, 289).

Appellant endeavors to draw from the correspondence touching such proposed transfer an inference of dishonesty on respondent's part. The Illinois Central Railroad Company had been endeavoring to arrange this transfer, and on May 31st wired respondent that the Union Steamship Company was agreeable to the transfer of the 1500 tons cargo, and respondent accordingly forwarded a memorandum agreement to protect the Union Steamship Company in that behalf (Apostles, pp. 293, 294). On the evening of the same day a night letter was sent to respondent from San Francisco, advising respondent that the Union Steamship Company expected to move all cars then in San Francisco by the end of June, but agreed to give to respondent for the Grace contract any cars remaining unshipped after July 1st, upon condition that respondent guaranteed an equal quantity of freight during later months (296). By a letter dated June 1st, although as indicated by the general course of correspondence this letter was probably dictated on the previous day, respondent advised libelant, among other things, that an arrangement had been effected for the transfer to libelant of 1500 tons then on the coast originally intended for the Union Steamship Company steamers (Apostles, p. 49; also Appellees' Brief, p. 5). Libelant quotes the statement last mentioned and, disregarding the rest of the correspond-

ence and attending circumstances, charges that the statement was untrue. Such was not the fact, however, for in view of the telegram received from the Illinois Central Railroad Company, respondent was justified in assuming that the proposed transfer of 1500 tons for sailing in June upon the Cacique had been agreed upon by the Union Steamship Company. Their faith in that understanding is shown by the fact that they drafted and forwarded a contract protecting the Union Steamship Company in that behalf (296). The letter to libelant must have been written with that understanding and prior to the receipt of contrary advices as to the Union Steamship Company's attitude in the form of a day letter from that company dated June 1st. Respondent was certainly entitled, in view of the telegram from the Illinois Central Railroad Company, to believe that the Union Steamship Company had consented to the transfer, which respondent in turn promptly agreed to. By such transfer the entire short tonnage for the Steamer Cacique would have been covered. On the other hand, this plan failed, and the later advices as to the position of the Union Steamship Company were to control. Nevertheless respondent was privileged to take any tonnage originally forwarded for the Union steamers and which was left at San Francisco on July 1st, for carriage on the Steamer Cacique. The Ford Company did not avail itself of this privilege for the reason as stated in its letter of June 1st to libelant that it was understood and expected, at least by respondent, that the

Steamer Cacique would load and sail in June (49). It is worthy of note, as stated in our former brief (page 6), that libelant in replying to this letter did not indicate that the Cacique would not sail until July, but expressly advised respondent that she would load on June 27th, and requested delivery of cargo alongside on that day "for loading as fast as vessel can receive" (352). It is not perceived wherein an offer on the part of the Union Steamship Company to surrender any of its cargo left in San Francisco after July 1st, so that respondent might, if it so desired, load it on the S. S. Cacique, indicates that respondent understood or agreed that the Cacique was not to load in June. We consider the failure of respondent to close on that offer shows very clearly that respondent considered its contract as one to be accomplished in June, otherwise it would have accepted the offer of the Union Steamship Company.

The statements to which libelant takes exception (Reply Brief, 5) are truthful in themselves and fully supported by the correspondence introduced by libelant. In the telegram addressed to respondent February 24th, inviting the present contract, respondent's agent said, "If you can take 6200 tons for early June can close with Grace & Company". Respondent replied on February 25th, "Accept Grace offer 6200 tons confirm advising names and dates of sailing". On February 27th respondent's agent answered, "Have signed with Grace American Steamer Cacique about June 24th". On the follow-

ing day, March 1st, respondent's agent wrote confirming the telegram, and said, "The boat is scheduled to sail about the 14th of June" (Apostles, pages 265-268; Appellees' Brief, p. 3). As stated by respondent to its San Francisco agent in a letter of May 31st, respondent's understanding was that the Cacique would sail on or about the 14th of June, until a few days prior to the date of that letter, at which time respondent learned that the sailing of the vessel was deferred until July. It was because of the recently obtained information as to this deferred sailing that respondent wrote the letter of June 1st to libelant, in which it was claimed that the contract called for June loading or June sailing, and that accordingly, libelant itself was not in a position to comply with its contract. For which reason respondent in said letter reserved its rights to so claim if respondent should fail in its plans to provide the full tonnage contracted for. Those plans were explained in the previous paragraph of the same letter to include 4075 tons previously shipped by respondent, the 1500 tons to be borrowed from the Union Steamship Company, and 542 tons procured from Peabody & Company. Therefore, respondent's letter of June 1st, which was incorporated by reference in the letter of June 14th, and a part of the so-called repudiation of the contract, expressly declared respondent's intention and expectation to supply the tonnage contracted for. Libelant's contention that respondent's plans for supplying the tonnage were predicated upon the

fact that the Cacique would not sail until after July, is merely an unwarranted inference on libelant's part. In passing, we might say that if libelant's inference were correct, it only serves to show that had libelant not filed its suit prematurely, and in advance of time when the vessel could load and, therefore, before performance was due on respondent's part, respondent might have had available the tonnage otherwise designed for the Union Steamship Company steamers.

4. Respondent's letter of June 14th.

It is next claimed that our statement "does not present a fair reflection of the effect" of respondent's letter of June 14th. Our statement as to this letter is to be found at page 6 of Brief for Appellees, and we can see no reason to apologize therefor in any way. Libelant says the letter was a flat repudiation. It could not be so understood. It was a reply to libelant's letter of June 6th (134), in which, referring to respondent's letter of June 1st (previously mentioned), libelant said, "We are glad to note that you have now arranged for 6099 tons out of the 6200 allotted to you and we hope you will be able to supply the remaining tonnage". By referring back to the letter of June 1st it is clear that respondent's argument as to the binding force of the contract was based on the fact that respondent had contracted for "*June loading*", which in the parlance must necessarily mean "*June shipping*"; and that a sailing in July voided the contract, etc.

It is true, as libelant says, that respondent stated that it had forwarded 4075 tons and would not forward more. At the same time libelant's letter, to which this was an answer, recited the understanding previously conveyed in respondent's letter of June 1st, which was the subject of interpretation in the letter of June 14th, that, in addition to the 4075 ton cargo so specially forwarded for the Cacique, respondent had arranged to forward 1500 tons from the Union Steamship Company, and had procured 524 (in fact 572) tons from Peabody & Co. The two latter shipments, amounting to 2072 tons, were already in San Francisco and did not require forwarding. Nor did respondent offer a new contract. Libelant in its letter of May 25th (102), to which the letter of June 1st was an answer, declared its purpose to hold such tonnage as respondent furnished, "for dead freight". As stated in our former brief, the contract did not authorize libelant so to do. Therefore, respondent's contention that this right, or alleged right, be not insisted upon, was not a threat, or a breach of the contract, but was merely a correct asserting of its rights according to the contract.

There could be no "implied declaration", as libelant states, "that respondent had already breached the contract", because, as previously stated, respondent's letter of June 1st, which was the essence of this correspondence, was written by respondent upon the assumption, and so stated, that 6099 tons cargo had been provided as a performance under the

contract. Moreover, an anticipatory breach *cannot be implied.* It must be distinct, unequivocal and absolute (*Dingley & Oler,* 117 U. S. 490; *6 Ruling Case Law,* 1025).

This letter should rightly be considered in the discussion of the question of anticipatory breach, but, since proctor for libelant has interpreted it and drawn his inference as to its effect at various points in his brief and without any necessary connection with the subject of anticipatory breach, we have dealt with it here in reply to its first appearance in Libelant's Brief.

5. Libelant's letter of June 22nd.

This letter was quoted at page 7 of Brief for Appellees with the statement that by such letter libelant fixed the time during which respondent should deliver its freight for loading. Libelant's Reply Brief admits that the demand contained in this letter was unwarranted, because the contract required respondent to deliver its freight only "as fast as the vessel could load". In this connection libelant claims that it was under no obligation to load the vessel in June, and, at page 13 of its brief, also admits that respondent was not required to deliver its cargo until after July 1st. Libelant further states that the notice was merely given out of deference to what is termed an erroneous contention on the part of respondent that the contract required June loading. On page 13 of its Reply Brief, libelant also asserts that the letter under

consideration "does not state or intimate that the Cacique would be ready to load on June 27th". The libel alleges (Paragraph IV, Apostles on Appeal, p. 11) that on June 5th libelant advised respondent "as to the loading date aforesaid, said Steamship Cacique would be ready for loading said 6200 tons of automobiles and parts in packages as per said contract of February 25th, 1916, on the 27th day of June, 1916". This letter, which was actually dated June 6th (352), also directed respondent to deliver its freight "for loading as fast as ship can receive". The letter of June 22nd by its terms supplemented the letter of June 6th, and after declaring that the vessel would be ready to load on June 27th, required respondent to commence delivering its freight on June 27th and to complete the same on June 29th (142). This disposes of libelant's claim that no loading date was mentioned. The allegation of the libel, and indeed the letters themselves, indicated that these letters were written to definitely fix a time for performance on respondent's part, which was necessary, inasmuch as the contract required libelant to specify a loading date in June when the vessel was nearer this port. Libelant's present admission that the demand for deliveries was premature and unwarranted, necessarily carries with it the implication that the vessel was not ready to load on June 27th or the two following days because if she was ready to load, the notice was not premature or unwarranted. And this admission on the part of libelant would dispose also

of the argument, advanced in the later pages of its brief, that libelant was ready or able to perform its contract at the time it filed its libel on June 27th (450). If we accept the further admissions of libelant, above noted, that respondent could have delivered its cargo after July 1st, and that libelant was not required to load the cargo in June, it is clear that performance was not due on the part of either party, irrespective of the notice and of the condition of the steamer at the time the libel was filed, which only goes to sustain the determination of the District Court that the action was filed prematurely and in advance of a breach. Moreover, if it be a fact, as asserted in Libelant's Brief, that the letter of June 22nd, demanding delivery by June 29th, was written to meet respondent's construction of the contract, such fact indicates either that libelant shared respondent's understanding that "shipment per American Steamship Cacique June loading" required loading in June or that libelant believed at that date that it would be able to meet its contract obligations, as interpreted by respondent, and load in June. Libelant's manager testified (218) that he intended to try and load a small, though not necessarily a substantial part of the cargo in June, simply to make a pretense of loading (219). Either view is inconsistent with the argument advanced by libelant in the trial Court and in its former brief, that the contract required loading only at some indefinite time after the vessel shall have made a trip to Oriental ports and re-

turned to San Francisco, and with the construction, presently contended for by libelant, that the contract contemplated loading on or after July 1st and not in June.

6. The 1100 packages delivered by respondent on libelant's wharf.

The fact of this delivery and of the correspondence with the Southern Pacific Company was stated at pages 7 and 8 of the Brief for Appellees; and the effect thereof considered at pages 33 to 35 of the same brief. Libelant, without questioning the correctness of our statement, says the delivery was qualified by a notice simultaneously delivered by respondent that these packages were delivered only under a new proposed contract. We are quite sure that proctor for libelant does not mean to say that any notice in the words as stated was actually or simultaneously delivered. He is only giving his version or interpretation of letters elsewhere noted. The argument of libelant, however, contains its own answer. Counsel says libelant did not accept the new contract and refused to receive this freight under any new contract. Yet the 1500 tons were admittedly delivered on the wharf at which the vessel docked and were ready for shipment (Libel pars. IV and VIII). Libelant's manager testified that libelant had received them as freight and held them in possession as freight at the time that the libel was filed, and that they were libeled in rem as freight (230-229-321). It is vain for counsel to

argue, on the other hand, that those packages were not received as performance under the original contract. Reduced to final analysis libelant's argument is that these packages were not received as freight under the new contract, because the new contract alleged to have been tendered was rejected, and that libelant did not receive them under the contract sued upon, because that contract had been repudiated by the new contract which had been tendered though not accepted. Arguments or conclusions must rest upon facts and principles, and not upon seductive fancies.

ANSWER TO ARGUMENT THAT THERE WAS AN ACTUAL BREACH BY RESPONDENT.

The District Court held that there was no actual breach on respondent's part since the vessel was not ready, and could not be made ready, to take on cargo at the time the suit was filed; also that when the libel was filed, neither the time for performance on respondent's part, as fixed by the contract, had not expired, nor the time as fixed by libelant's notice of June 22nd had expired. Replying to libelant's attack upon this decision, respondent showed by the indisputable evidence in the record that at the time the libel was filed the vessel was laden with 7900 tons of inward cargo and was not unloaded before July 8th; that the vessel herself was unseaworthy and would not be permitted to clear at the port of San Francisco until, having been unloaded, she had been placed in drydock and undergone repairs, which was only

accomplished on July 12th; that libelant's manager had not expected to begin to load until June 30th, and admitted that it was impossible for libelant to have loaded any cargo up to June 29th, or, indeed, at any time during June. We also showed that although respondent was only required under the contract to deliver its cargo "as fast as the vessel could load", libelant had, by its letter of June 22nd, demanded that respondent commence to deliver its cargo on June 27th and complete such delivery on June 29th (a demand which in its Reply Brief libelant has admitted was unwarranted on its part). Two days of that specified time had not elapsed when the libel was filed. Upon these facts and well-settled principles of law we submitted that the decision of the District Court was unassailable. Respondent's argument in that behalf is found in pages 15 to 18, inclusive, of Brief for Appellees, and will not be here repeated.

Returning to the discussion of this branch of the case in its Reply Brief, appellant has confused the principles applicable to an actual breach with those pertaining to an anticipatory breach. For example: Libelant's observations upon the letters which were alleged in the libel to constitute the anticipatory breach, should properly be directed to that portion of appellant's argument. If appellant's argument that respondent's letters constituted an anticipatory breach were correct, which we have elsewhere shown is not a fact, whether the breach so claimed to have been tendered was accepted or not, the same letters

could not constitute an actual breach, because the contract could not have been breached and also be still alive. Again, if it were conceded for the purposes of the argument that the portion of the testimony of libelant's manager, quoted at pages 10 and 11 of the Reply Brief, justified an inference on the part of proctor for libelant, that libelant was notified not to touch respondent's cargo or at least the 1100 packages, this was admittedly prior to the time that any portion of that cargo could have been loaded upon the vessel, and at a time when the vessel was unseaworthy or could not be made ready to accept freight. Mr. Carter so admitted. Libelant is not warranted to draw such an inference from the testimony, as will clearly appear from the question and answer next following the matter quoted by libelant from page 229 of the Apostles on Appeal. That question and answer are: "Q. You had not been prevented up to that time? A. No."

For the reasons stated by the District Court and according to elementary principles of law, there could have been no actual breach of the contract on respondent's part at the time the libel was filed. The tests by which to determine whether there was such a breach are fundamental, namely: Was performance due at the time of the alleged breach, and had libelant performed, or was it ready, able and willing to perform its obligations? The Court found that neither of these conditions existed, and we have already shown that at the time the libel was filed and for some weeks thereafter the vessel was

unseaworthy and could not load; that she would require fumigation, which could only be done after the inward cargo was discharged, which was not until July 8th; that she was unable to load any cargo on the 27th or 28th of June, assuming that this cargo could have been loaded while the inward cargo was being unloaded; that the contract required respondent to deliver its cargo for loading only "as fast as ship can load", and furthermore, that the time specified by libelant in its notice of June 22nd had more than two days yet to run. Libelant itself, however, has furnished a perfect defense to the charge of actual breach upon the part of respondent. On page 6 of its Reply Brief, libelant declares that it was under no obligation to load in June, and that a loading in July satisfied the contract. Speaking of respondent's obligations, at page 13 of the same brief, libelant expressly admits that respondent was permitted, and well within its rights, to deliver its cargo after July 1st. If, as libelant admits, respondent was permitted under the contract to deliver its cargo after July 1st, it was obviously not guilty of a breach of contract in failing to deliver the whole cargo on June 27th.

Nevertheless, libelant in its Reply Brief asserts that performance on respondent's part was due on June 27th (the day the vessel arrived), and that libelant was on that day ready, able and willing to perform its contract.

Libelant's first observation is that performance on respondent's part was due on June 27th, to the

extent that respondent should have ready 6200 tons of cargo on that date. In the next sentence, however, libelant declares that by the demurrage clause respondent had bought the ship's time for a few days. We do not follow this argument, for if, by the demurrage clause, respondent had bought the ship's time for a few days it had bought it for the whole of June 27th and for an indefinite number of days. There is no limitation in the contract on this subject except the expression "June loading". In advancing the argument that respondent was liable to perform or deliver the 6200 tons on June 27th, libelant overlooks the fact that respondent was only required to deliver its cargo alongside the wharf "as fast as vessel can load". The contract furthermore required that a definite loading date should be specified by libelant. By its letter of June 22nd, libelant said, "Please note the delivery 6200 tons automobiles and parts, full quantity your engagement under contract dated February 25, must commence on that date, June 27th, and be completed not later than June 29th" (Apostles on Appeal, p. 351). Assuredly respondent had, by virtue of that notice, all of June 27th within which to commence deliveries (1500 tons had already been delivered and received as freight), and could continue such delivery during the whole of the 28th and 29th of June. This notice was a material act required under the contract, and libelant could not therein fix the time of delivery as of June 28th and 29th, and claim for the first time on this appeal that such delivery

should have been made wholly on June 27th. Libelant cannot thus play fast and loose. Again, if, as libelant says, the demurrage clause extended the time of performance on respondent's part, performance was not due when the libel was filed June 27th, because by the terms of the letter and telegram sent to respondent by libelant on the morning of the 28th of June, libelant stated definitely that "the Steamship Cacique *was ready to load your cargo contracted for on February 25th, 1916, on June 27th, 1916, at 9:00 P. M.* As you have failed to deliver the cargo alongside the steamer as fast as vessel can load, demurrage at the rate of $3,000.00 per day commences *on the day and at the hour last mentioned*" (Apostles on Appeal, p. 141). The libel had been filed several hours before the hour so designated. If, as is admitted by libelant, the demurrage clause extended the time, such extension must be taken as beginning when the demurrage began, which would only be when delivery was to be made, for the contract provides that the demurrage should apply only if the cargo was not delivered alongside the steamer at San Francisco "as fast as vessel can load" (Apostles on Appeal, p. 448). The performance that the contract required of respondent was the delivery for loading of 6200 tons cargo "as fast as vessel can load". On June 27th the time so designated by libelant in the notice of June 22nd had more than two days yet to run; and by reason of the vessel's unseaworthy condition she could not have loaded on that day or until July 12th; and no

freight was or could have been loaded on June 27th or, in fact, at any time during June, according to the testimony of libelant's manager.

The argument that libelant was on June 27th ready, able and willing to perform the contract is wholly without support. Counsel says that because the trial Court found that libelant was *willing* to carry out the contract, it intended to hold that libelant was *ready and able* to perform. But the Court expressly decided otherwise. In the passage quoted from the Court's opinion, it is said: "On June 27th, however, the Cacique was not ready to take on cargo and could not have been ready to do so" (Apostles on Appeal, p. 450). If the vessel was not ready or able to load, libelant was not ready or able to carry out its contract, as the vessel was the only medium whereby libelant could perform its contract. If the vessel was not ready to load on June 27th, performance on respondent's part was not due on that day, for the only requirement of the contract was that respondent should deliver its cargo "as fast as vessel can load" (448). The evidence of libelant's manager was that the vessel did not discharge her inward cargo until the afternoon of July 8th (71, 72). He did not expect to commence loading before the 30th day of June, and became satisfied that the ship could not take on any freight before the last minute of the last day of June (211). Continuing he says libelant was not in a condition to load any freight on the Steamer Cacique on June 28th (223). The same witness admitted that by

reason of injuries to the vessel she would not have been permitted to sail without a seaworthy certificate from Lloyds, and that it was also necessary to fumigate the vessel (239, 228). Lloyds' Register of Shipping ordered the vessel to drydock in view of the report of the surveyor at Hongkong, and required that certain repairs be made. The surveyor testified that without such repairs the vessel was unseaworthy and would not have been permitted to go to sea (244). Captain Heppell, the surveyor for Johnson & Higgins, testified to the same effect (342, 343). There was no conflict in this testimony. Obviously, the vessel was unseaworthy until she had undergone repairs in drydock, which were completed on July 12th, and she was not ready to load, or able to perform, under the contract of affreightment, on the 27th day of June or at any time during June.

Libelant next contends "that it is immaterial under the contract that the steamer was not ready to load on June 27th". In our view of the case, and we might add in that also of the District Court, the want of readiness to load on libelant's part is a most material fact. The libel was filed on that day. As before stated, if the vessel was not ready to load, respondent was not obligated to deliver its cargo, and accordingly could not have breached its agreement on the 27th of June or at the time the libel was filed. Proctor for libelant in the preparation of his Reply Brief, realized that libelant had in writing on June 6th and 22nd announced that the steamer would be ready to load on June 27th and

had demanded that delivery of respondent's cargo should commence on June 27th and be completed on June 29th. The testimony of libelant's manager showed that it was impossible for libelant to load the cargo or any of it during those days, and, therefore, libelant now makes a virtue of necessity by admitting that the letter of June 22nd was an unwarranted demand on libelant's part, and libelant also admits that respondent was within its rights if it had sought to deliver its cargo after July 1st. It would seem that libelant in attempting to escape one horn of the dilemma, has impaled itself upon the other, for, if respondent was not required to deliver the cargo on June 27th, June 28th and June 29th, as directed by libelant's letter of June 22nd, it could have delivered such cargo on June 30th or at any other date or even after July 1st. It naturally follows that there was no actual breach on respondent's part when the libel was filed on June 27th. Upon that theory of the case respondent was free to borrow the 1500 tons from the Union Steamship Company after July 1st, a plan which Libelant's Brief has credited to the respondent. The fact remains, however, that the contract only required respondent to furnish cargo "as fast as vessel can load".

It would seem that in admitting that the steamer was not ready to load on June 27th, and that performance, in the sense of delivering the cargo, was not due on respondent's part on that day or ever in June, libelant must of necessity agree with the

decision that the libel was filed in advance of an actual breach of the contract. Proctor for libelant, however, attempts to escape this conclusion by the claim that performance under the contract was not merely the delivery of 6200 tons cargo. Proctor for appellant says that performance on respondent's part required that on June 27th respondent have available for loading 6200 tons of automobiles and parts. The fallacy of this argument is apparent. Availability of automobiles and parts for delivery was a negligible matter. Delivery of the stipulated quantity when delivery should become due was the essential act to constitute performance on respondent's part. The contract was one of affreightment, the object of which was to move by steamer the contracted tonnage, in order that the steamship owner might earn the freight money. No particular type of automobiles or parts was indicated, nor was it agreed that the cargo should be manufactured in February or in any other month or at any particular plant. All that the contract required was that 6200 tons of automobiles and parts, packed in a particular manner in respect of size and weight, should be delivered for cargo on the steamer named. The contract had reference, therefore, only to the delivery of the freight for shipment. Libelant's argument that respondent had previously made it impossible to perform the contract, was disposed of in the earlier pages of this brief, though the contention is wholly immaterial inasmuch as specific breaches by letter were alleged, and libelant was

not ready or able to load when its suit was filed. There was always the possibility, if not the certainty, of securing other automobiles and parts sufficient to satisfy the contract within the time that performance would become due on libelant's theory of the contract, especially as respondent was only required to deliver "as fast as the vessel could load".

Exception is taken to respondent's statement that the verified libel charges that the eleven hundred packages of freight were delivered in part performance. Respondent's statement is amply supported by Paragraphs V and VIII of the libel (Apostles on Appeal, pp. 11 and 13) and by the testimony of libelant's manager, who said these packages were delivered for shipment and held as freight (Apostles on Appeal, pp. 226, 230). There was but one contract.

Answering the matter on page 8 of Brief for Appellees, proctor for libelant says (p. 15): "Granting that the time for delivery on respondent's part had not arrived, the facts show that performance on respondent's part was commenced on May 1st and that the time for making the shipment of 6200 tons ready was long overdue on June 27th". Respondent certainly did not breach the contract by commencing to perform it on May 1st. There could be no shipment, in the sense of delivery for loading, until the vessel was ready to load. Time of shipment from other points, and time and place of man-

ufacture were wholly immaterial and not the subject of agreement at all.

It is not claimed that any notice or demand for delivery subsequent to that of June 22nd was ever given to respondent, nor is it apparently claimed by libelant that respondent breached the contract after June 27th, upon which day libelant seized respondent's cargo under admiralty process. It is not necessary to show that the case must stand or fall upon the sufficiency of the proof to sustain the breach alleged to have been committed prior to the filing of the libel on June 27th.

There was no question before the District Court, nor is there here, as to whether respondent breached the contract after July 1st or after the libel was filed. On June 27th libelant seized by process in rem the 1500 tons of freight or cargo then in its possession, and attached under process of foreign attachment all other automobiles and parts belonging to respondent and then in the yards of the Southern Pacific Company at San Francisco. During the presentation of the case the trial Court expressly asked proctor for libelant whether a breach occurring after the filing of the libel would support the suit, to which proctor for libelant replied, "No, I will rest on the breaches down to the time of the filing of the libel" (Apostles on Appeal, p. 443). This solemn and deliberate reply definitely fixed the rights of the parties in this case. Libelant could not have claimed otherwise, for its libel had alleged that libelant was ready, able and willing to perform

its contract at the time the libel was filed on June 27th, but that respondent had breached it by two letters, namely, one of June 14th and the other of June 24th. The District Court properly, in the light of these facts held that there was no actual breach of contract on respondent's part and that the suit was filed before breach had occurred.

THERE WAS NO ANTICIPATORY BREACH ON RESPONDENT'S PART.

The libel charged that respondent had breached the contract in anticipation of performance due by its letters of June 14th and June 24th, respectively. Issue was taken on these allegations. The District Court decided that if there had been an anticipatory breach or breaches prior to the filing of the libel, libelant had refused to accept such renunciation or breach on respondent's part and on the other hand had accepted part performance under the contract (451). In answering libelant's attack upon the decision we briefed the subject of anticipatory breach at pages 19 to 47, inclusive, of the Brief for Appellees. At page 23 and following we noted all the evidence to be found in the record and considered the law as declared by the Supreme Court of the United States and by the highest courts in other jurisdictions, noting also the cases cited by appellant in its former, and in this brief. We shall, therefore, at this time only refer to the points advanced by Libelant's Reply Brief on this branch of the case.

Appellant's first observation is that the decision as rendered ignored what libelant terms the "fundamental question" * * * "namely, the construction of the contract between the parties". Upon this premise, proctor for libelant argues that the case was not decided upon the merits, but upon purely technical grounds. The construction to be placed upon the contract was the subject of argument at the trial and the learned District Court in its decision held, "As the Court construes this contract, it fixed June as the time at which the Cacique should load the cargo of 6200 tons agreed to be furnished by respondent" (Apostles on Appeal, p. 449). The libel having charged only that respondent breached the contract in anticipation of performance due, and that charge being denied, the trial Court held, as above stated, that there was no anticipatory breach, because if the contract had been repudiated by respondent, libelant had refused to accept such renunciation and had accepted part performance under the contract. It is, therefore, clear that the question claimed by libelant to be the important one, was directly determined, and that the opinion actually decided the issue directly tendered by the pleadings. It is obvious that the decision was upon the merits, and not upon any technical or nonmeritorious grounds.

The 1100 packages or 1500 tons were delivered to libelant as freight and were so retained and libeled in rem as such freight which was acceptance of part performance under the contract.

Appellant attacks this finding of the District Court, with some variation as to form, at a great many places in its Reply Brief. We shall endeavor to co-ordinate the various charges, reduce the subject to the lowest common denominator and dispose of it now, once and for all. We are not contending that the 1100 packages of freight in libelant's possession at the time the suit was filed could not have been libeled in rem as freight if there had been an actual breach of the contract after performance thereof was due. We are not attacking the form of the remedy by a libel in rem if an actual breach of contract had occurred, but the Court held, and we have previously shown, that there was no such actual breach. It is practically admitted that performance was not due at the time the goods were libeled. The decision of the Court and the argument of respondent are not that the libeling in rem would not be a remedy for an actual breach of the contract, but that the libel in rem of the 1100 packages as freight evidenced the understanding and intention on the part of libelant, that the packages so libeled were accepted and held as freight by libelant and necessarily, therefore, as part performance of the only existing contract. By the delivery of the 1100 packages or 1500 tons for shipment as freight upon the steamer, respondent partly performed the contract,

and by accepting delivery of said packages and libeling them by process in rem as freight after notice of the alleged repudiation, libelant accepted part performance under the contract. The correctness of the Court's decision as a legal principle is unqualifiedly approved by the Supreme Court of the United States in the decisions cited at page 39 of the Brief for Appellees, and also in the case of *Marks v. Van Eighen,* 85 Fed. 853.

The argument, therefore, in so far as it concerns the 1100 packages or 1500 tons of freight, is reduced to the determination of two simple questions: (a) Were the 1100 packages received by libelant as freight and (b) were they, as such freight, libeled by process in rem?

The first of these questions is answered in the affirmation by the libel itself and by the testimony of libelant's manager, Mr. Carter, who on cross-examination admitted that these 1100 packages were received on the dock and ready for shipment on the Cacique (226); that they were received and libelant held them as freight (230); that libelant was not prevented by respondent from loading them upon the steamer when she did arrive at that dock up to the time the libel was filed (229). It is admitted by proctor for libelant that there was but one contract, accordingly the packages could have been delivered and received as freight only under the contract sued upon.

The second question is also answered in the affirmative by the process and return in this action, and by the testimony of libelant's manager, who testified that libelant foreclosed in this action its maritime lien on that freight (321).

The essential fact is that, assuming for the sake of the argument that the contract had been repudiated in part, or even in whole, libelant accepted part performance thereunder when it held the 1100 packages or 1500 tons as freight, and libeled the same in rem as freight within the admiralty and maritime jurisdiction. Counsel apparently misconceives the effect of these facts, and the force of the District Court's opinion, when he claims that the Southern Pacific Company asked libelant to redeliver this cargo. Libelant's manager, when questioned in that connection, said that these packages were on libelant's dock, ready to load, on June 27th, and that his company was not prevented by the Ford Motor Company from loading them. If, then, some employee of the Southern Pacific Company had asked (with or without warrant) the return of this cargo, no effort was made to get it, and nothing interfered with libelant's loading it when the vessel arrived, except the condition of the vessel. Libelant at least was free to elect whether to give up the cargo or to hold it as freight. It did the latter. Mr. Carter testified that he did not comply with the request of the Southern Pacific Company, but proceeded to foreclose his maritime lien upon this freight (321). This was after notice of any and all

alleged repudiations on respondent's part, and was a deliberate acceptance of part performance. This served to obviate any claimed breach by anticipation, and kept the contract alive for all purposes, requiring libelant to wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise (*Wells v. Hartford Manila Paper Co.,* 55 Atl. 599; *Dingley v. Oler,* 117 U. S. 490.)

Libelant seeks to escape this result and the conclusion of the trial Court by now contending that the libel in rem did not evidence an understanding or acceptance of partial performance, but indicated a total breach. It is not questioned on our part that, where freight or cargo has been delivered and accepted as freight and an actual breach of contract occurs, the ship may enforce its maritime lien on the freight. Such are the cases cited in Libelant's Brief. But we do say that two conditions must exist to apply that rule: The freight must be loaded, or within admiralty jurisdiction, and there must have been a breach of contract. The 1100 packages, having been delivered on libelant's wharf ready for shipment and having been received and held by libelant as freight, as libelant's manager testified, were subject to the admiralty and maritime jurisdiction as alleged in the libel. There was no interference with libelant's possession (229-321). There was no actual breach of the contract, however, as elsewhere shown, for the vessel was not ready to load and the time for performance had not arrived. At

various places in its brief libelant has declared that performance was not due on respondent's part until after July 1st. This was destructive of the claim of an actual breach of contract on respondent's part, but it did not destroy the effect of the libel in rem as evidence of an accepted partial performance under the contract.

The difference between the libel in rem, acting as an enforcement of the maritime lien upon the freight as such, and the lien obtained by levy of process under foreign attachment, was too well known by proctor for libelant to have been lightly disregarded. The action in rem would not lie against these packages unless they had been delivered and were held as freight under the contract. The title of the action and the libel and other papers filed in libelant's behalf (and set forth at pages 363 and following of the Apostles) show the particular care exercised by libelant to establish the fact, also expressly testified to by libelant's manager, that these packages were delivered to and received and held by libelant as freight under this contract. They were so held at the time the libel was filed, and the libel expressly alleged that they were within the maritime and admiralty jurisdiction of the Court, which could only be so if they were freight.

There was nothing anomalous in the status of these 30 carloads of automobiles at the time the libel was filed. They were on libelant's wharf, ready for shipment on the vessel which had then arrived and docked. They were held by libelant as freight, as

libelant's manager testified. Libelant enforced its maritime lien, which it could only do if it had received and accepted them as freight. It follows, as a legal conclusion, and the District Court so determined, that this acceptance of part performance obviated any alleged repudiation of contract on respondent's part.

We will refer at this point to another matter, not that it has any legal significance, but because it is touched upon at various points in Libelant's Brief. It is stated that respondent stopped the delivery of, or attempted to withdraw, its cargo, and that the Southern Pacific delivered the same by mistake. In one instance it is said that respondent stopped the delivery after the Steamer Cacique arrived, on June 27th. This latter statement is wholly unsupported and, especially in view of the admission of libelant's manager that no communication was received from the Ford Motor Company after the steamer's arrival, we must assume that libelant refers to the correspondence with the Southern Pacific Company. That such is the case is shown by the argument at pages 22 and 23 of the Reply Brief. At that, libelant's statements or inferences are much broader than the facts justify. If the Southern Pacific Company's letter of June 27th was received on that day or before the libel was filed, a fact which was not established, and if the evidence in connection with the statements of the Southern Pacific Company were not stricken from the record by the Court's order (Apostles on Appeal, 258), the refer-

ence to respondent's letter of June 22nd could have no greater weight than the letter itself upon which libelant now bases its argument. This letter was dated at San Francisco June 22nd, and was quoted and considered at pages 34 and 35 of our former brief. It reads as follows:

> "Dear Sir: Attention Mr. Frank Renz, Steamer Clerk.
>
> Confirming our telephone conversation of recent date: Until you are advised to do so, please do not, under any circumstances, deliver any of the cargo at present on hand booked Steamer 'Cacique' to W. R. Grace & Co.
>
> Ford Motor Co.
> Traffic Department,
> L. C. Davis."

It is significant that in its reference to this letter libelant omits the material clause "until you are advised to do so".

These instructions did not repudiate the contract nor refuse to perform the contract nor declare a purpose not to perform the contract. Respondent's agent merely directed the Southern Pacific Company not to deliver cargo booked for the Cacique "until you are advised to do so". At that time the vessel had not reached the Port of San Francisco. The delivery dates specified by libelant had not yet arrived, and obviously the vessel was not ready to load her cargo. Under all conditions, therefore, delivery on respondent's part through the railroad company was not due, and giving to the letter the broadest possible interpretation, it could not be said to constitute of itself a notice to the Southern Pa-

cific Company, much less to libelant, of a refusal to abide by the contract. If this letter, or the statement of a Southern Pacific employee is considered as evidence of a mistake on the part of the Southern Pacific Company in delivering the cargo, or as an effort to retake possession, whether such statements were justified or not by the instructions from respondent to the Southern Pacific Company, no one interfered with libelant's possession or prevented its loading these packages when the vessel arrived. Libelant did not consider the suggestion of the Southern Pacific seriously enough to return any of the cargo, but proceeded two days thereafter to foreclose its maritime lien thereon (Apostles, pp. 229, 321).

Libelant's letter of June 26th.

Replying to the argument of libelant and to the charge in its libel that the letters of June 14th, and June 24th, constituted a breach of contract in anticipation of performance due, we quoted at page 39 of our opening brief, the universally accepted rule of law to the point that the renunciation or repudiation does not of itself breach the contract, but that such renunciation must be treated and accepted by the other party as actually terminating the contract. If not so accepted, the contract is kept alive for all purposes. We argued that, assuming the letters referred to constituted a repudiation on respondent's part, libelant elected not to accept such breach, but continued the contract in full force and effect, not only by receiving and holding the 1100

packages as freight and foreclosing its maritime lien thereon, but by declining renunciation in its letter and telegram to respondent under date of June 26th. Thereby the contract was continued in force throughout the 27th, 28th and 29th days of June, during which days delivery of respondent's cargo was demanded by libelant. Libelant claims, however, in its Reply Brief, that this letter was an acceptance of a breach and an acquiescence in the total repudiation of the contract except insofar as libelant reserved the right to prosecute a claim for damages. A sufficient answer to this argument exists in the undoubted fact that libelant retained and accepted as freight the 1100 packages delivered upon its wharf for shipment on this vessel. This was part performance, and part performance of a contract and total repudiation of the contract cannot co-exist. However, we will meet libelant's argument squarely on the face of the letter and the telegram. The letter, which was addressed to respondent, is set out at page 138 of Apostles. It refers specifically to the contract and expressly acknowledges receipt of the letters of the 14th and 24th of June, which libelant claims in its libel, constituted the anticipatory breach. The letter then proceeds, "We now have to advise you that we stand strictly upon the contract made with you and insist upon your fulfillment of the same in every particular. We are and have always been ready to perform all our obligations under said contract." If respondent's letters, specifically referred to, had

tendered a breach of the contract or had repudiated the same, libelant had the right of election to say whether it would accept the breach or continue to perform the contract. It said, "We stand strictly upon the contract and insists upon your fulfillment." Such fulfillment could only be insisted upon if the contract was recognized as still existing. Again libelant said in its letter, "We are * * * ready to perform all of our obligations under said contract." Libelant could not be ready to perform its obligations under a contract which it recognized as non-existent or as terminated. When, therefore, it announced that it was ready to perform under this specific contract, it said as directly as human words could express it, that the contract was still alive and that libelant would perform it, and would insist upon respondent's performance.

Basing its argument upon the fact that respondent's letters had indicated that 4075 tons cargo only would be delivered, libelant gives to the word "satisfaction" as used in the letter of June 26th, a meaning which the context does not justify. The letter is dealing with freight to be delivered and not money to be paid. Respondent had offered 4075 tons, although in fact, it was delivering more, as freight under the contract. In the portion of the letter to which libelant refers, libelant said, "we further advise you that we will take such quantity of automobiles as are delivered to us * * * we will not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only

as the partial satisfaction which it, in fact, is". The letter referred to a tender of cargo to be carried as freight under a contract of affreightment. and in view of that circumstance, the word, "satisfaction" must be taken as the equivalent of the word "performance" and the letter must be interpreted to mean "we will take such quantity of automobiles as are delivered to us not as a full performance of the contract, but only as the partial performance which it, in fact, is". This is emphasized by the fact that in the sentence quoted by libelant, respondent is advised that it will be held responsible for all damages, including demurrage, "which we may ultimately sustain by reason of any breach of said contract". If the letter had treated of a breach as already committed, the expression "any breach" would not have been employed, and if there had been a present or previous breach accepted or relied upon, libelant would have had at hand a measure of damage. In the portion of the letter first quoted above, libelant certainly declared that the contract was and would be continued in effect, for, as above stated, it announced its present intention to perform the same. Furthermore, the fact that libelant expressed its willingness to accept the 4075 tons as cargo, necessarily implied, shipment upon the Steamer Cacique because for that purpose only, it was offered. The legal effect was equivalent to an acceptance of partial performance, the consequence of which, as hereinbefore shown, was of necessity a rejection of a

total repudiation of the contract, if one had been so offered.

By this letter libelant stated in substance, "We will not make a new contract or release you from the old contract. We are prepared to perform our contract and insist that you shall de likewise. We shall accept the cargo which you offer as part performance and shall hold you in damages for any short cargo and for demurrage under the contract". This was consistent with the fact that libelant then held 1500 tons of cargo ready for shipment, and was also in line with the demand made by libelant on June 22nd, that respondent begin to deliver its cargo on June 27th and complete the delivery thereof by June 29th. In the same letter libelant had notified respondent that the steamer would arrive and be ready to load on June 27th. She was then expected, and arrived and docked at 7:30 o'clock on the morning of June 27th. The "change of front" referred to on pages 25 to 27 of our former brief, was the result of conditions of which libelant became aware on the morning of June 27th, and within a few hours after the docking of the steamer. Then, for the first time, libelant discovered its inability to load respondent's cargo on the 27th of June, or in fact, at any time in June, and filed its libel claiming an anticipatory breach on respondent's part, because such breach would save libelant performance on its part. In this connection, libelant asks why, in reason, it should not have carried out its contract in accordance with its letter and telegram of June

26th. This question is answered by the learned District Judge, who said that at the time the Libel was filed, the vessel was not ready to load and could not be made ready to load (450). One of the reasons was the inability to discharge the inland cargo before July 8th, and another reason was that the vessel was unseaworthy and could not have loaded respondent's cargo or cleared at the Port of San Francisco until she had been placed in drydock and undergone necessary repairs. Libelant asserts that we exaggerated the unseaworthiness of the vessel in our reference to that matter at pages 25 and 26 of our former brief. The evidence as to the condition of the vessel was furnished by libelant. This and the opinions of the surveyors were uncontradicted. No misstatement is claimed to have been made and no exaggeration was possible.

Libelant professes to see no merit in our suggestion that the notice from libelant to respondent was given on the morning of June 28th, that the steamer was ready to load at 9:00 P. M. on June 27th, whereas the libel was filed some hours earlier on the same day. To our minds, that indicates that if the vessel was not ready to load at 9:00 P. M. on June 27th, which has been clearly established and is practically admitted by libelant, the notice was false. If, on the other hand, the vessel was not ready to load until that hour, and such would be the force of the notice, the libel was filed prematurely, as it was anyway, because the delivery dates specified by libelant had not elapsed. The answer of

libelant's manager that by such notice he intended to advise the Ford Motor Company that the contract was still in force as to the demurrage clause, is tantamount to an admission that no earlier breach by anticipation had occurred or been accepted. If the contract had been breached by anticipation, it was not in effect at the time the libel was filed, and, therefore, there was no demurrage clause. If the contract had been breached by anticipation before the filing of the libel, it was wholly absurd for libelant to advise as it did in the letter of June 28th.

Under the rule as announced by the Supreme Court of the United States and in the cases cited at pages 39 and following of our Opening Brief, and universally followed, in order to effect an anticipatory breach of contract, there must be a renunciation and an adoption or acceptance, which, in effect, terminates the contract and excuses further performance thereof.

> "The renunciation must be so distinct that its purpose is manifest and so absolute that the intention to no longer abide by the terms of the contract is beyond question. The acquiescence therein must be as patent. There must be no opportunity left to the promisee to thereafter insist upon performance if that shall prove more advantageous, or sue for damages for a breach if events shall render that course the more promising."

The vital weakness of libelant's case was that assuming there had been an unequivocal or absolute repudiation, which was not a fact, libelant did not

accept it, when tendered, but kept the contract alive for all purposes, which required that libelant wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise. This could only be when respondent should refuse to deliver its cargo alongside the wharf "as fast as the vessel can load". Before that time arrived libelant filed suit and seized respondent's cargo. Libelant had in possession as freight 1100 packages, or 1500 tons of cargo, and in order to enforce its maritime lien thereon by a libel in rem, it necessarily accepted and retained said packages as freight which constituted a part performance of the contract. The part performance so accepted destroyed the possibility of there being a total repudiation or setting aside of the contract and the District Court correctly so decided (*Wells v. Hartford Manilla Paper Company,* supra).

ON THE MEANING OF THE TERM "SHIPMENT PER S. S. CACIQUE JUNE LOADING."

On pages 47 to 64, inclusive, of Brief for Appellees, respondent endeavored to present this question so as to aid this Court as far as possible in arriving at a correct conclusion. We are criticized in Libelant's Reply Brief for having limited the discussion too closely to the words "June loading". Proctor for libelant says that the meaning of the clause must be determined by detaching the three words, "Cacique June loading". We apprehend

that the Court, if it shall deem it necessary to particularly construe this clause, will construe the whole clause and with it the whole contract. Libelant seems to attach a tremendous importance to the non-existence of a comma. In its fromer brief, appellant claimed that we had introduced a comma between the word "Cacique" and the word "June". We deemed the suggestion unimportant and passed it without notice at that time, inasmuch as we had not written a brief and, therefore, could not have introduced a comma in anything filed in this Court. We would make no mention of the point at this time were it not for the fact that Libelant's Reply Brief charges that respondent introduced a comma in the briefs filed in the District Court, which statement was coupled with the insinuation that such act was done to gain an advantage for respondent. Though counsel admits that the comma was not inserted in our former brief, he says that it was "not attempted in the brief for appellees", but that respondent produced the same effect by detaching the words "June loading". We shall not attempt to defend ourselves against such an argument, but we shall claim the indulgence of the Court to the extent, at least, of showing that any imputation that the learned District Court was mislead, or did not appreciate the absence of the much-mentioned comma, finds ready answer in the record. Proctor for libelant, in arguing the case in the trial Court, called particular attention to the fact that there was no comma between the word "Cacique" and the words "June

loading". He stated also, that he considered the comma of some importance in the interpretation of this clause and that inadvertently a comma had crept into the briefs filed on the demurrer to the answer (Apostles on Appeal, page 379).

Though at another place in its brief, perhaps in an attempt to minimize the importance of the point there under discussion, libelant stated that the construction of the contract as to the time of loading was "the fundamental question" on which the controversy turned, the allegations of the libel as well as the theories advanced by libelant in its Reply Brief, have given to the question as to whether libelant was required to load respondent's cargo in June, only secondary importance.

Assuredly, for the contract so provides and libelant in its Reply Brief so admits, respondent was not called upon to deliver its cargo, except "as fast as the vessel can load". Libelant's manager testified, the District Court found and it is not seriously questioned in the briefs, that the steamer was not ready to load respondent's cargo when the libel was filed or, in fact, at any time during June. Though libelant had demanded that respondent's deliveries for loading commence on June 27th and be completed on June 29th, it is now admitted that said notice was unwarranted under the terms of the contract (Reply Brief, pp. 6, 13). On the first of the cited pages libelant states that "a loading in July satisfied this contract". At page 13, it is announced that respondent would have performed the contract

by a delivery of its cargo "after July 1st, and, again, on page 20 libelant declares that a delivery on July 12th "was within respondent's contract". Accordingly, and because the vessel was not ready or able to load at the time the libel was filed, this provision could not serve to establish a breach if respondent failed to deliver its cargo before the libel was filed on June 27th.

The libel charged an anticipatory breach in advance of the time that performance was due. That issue depends upon two questions: Was there a total and unqualified renunciation of the contract on one side and, did the other party accept such renunciation so as to excuse performance on the part of both sides thereafter. The determination of that issue cannot be affected, whether "June loading" or "Cacique June loading" means loading in June or a loading at some other later or indefinite time.

Libelant correctly instances its importance on the effect of libelant's responsibility in damages for a failure to move the cargo in June, but respondent is not pressing a claim for such damages in this Court.

The only other theory upon which the meaning of those terms could have any bearing, except a purely academic one, would be that libelant claims that respondent breached the contract in July or, at least, after the libel was filed. Such a claim could not be urged under the pleadings, and was expressly excluded by the following question propounded by the Court during the trial, and libelant's answer thereto:

"The COURT. Q. And no after breach would support this libel, would it? COUNSEL FOR LIBELANT. No, I will rest on the breaches down to the time of the filing of the libel."

We shall not, therefore, encroach upon the Court's time by further discussion of this subject, it having, as we believe, been adequately presented in the cited pages of Brief for Appellees. We shall, however, briefly answer libelant's argument wherever it is based upon the charge or assumption that a statement made by us in our former brief is either untrue or unwarranted. We shall do this, not because of the importance of the statements criticized, but because we believe that any statement by counsel to the Court should be marked by candor and a nice exactness. Our references will be to the evidence, which in our opinion sustains, the statement under criticism.

We stated in our former brief that on final analysis libelant's argument then advanced was that "June loading" meant not a loading in June, but a loading sometime when the Cacique should return from her expected trip to Oriental ports (p. 48). Libelant objects to this statement and disclaims the making of such a foolish claim. Reference, however, to its former brief shows libelant claimed, at the bottom of page 47 and at the top of page 48, that the words "Cacique June loading" meant what was stated for said claim at the cited pages of our brief. We fail to see any difference between the evil resulting from a discussion of the detached

words "June loading" and the evil to flow from the discussion of the equally detached words "Cacique June loading", which is made the basis of libelant's present argument on the construction of the contract.

Our statements at pages 56 and 57, that libelant knew respondent wanted cargo space for "May or June sailing" and that our agent sought such space, are supported by the testimony of Mr. Davis (pp. 325 and 326 of Apostles), wherein he states that he asked for "June sailing" and showed his telegrams, which are set out at pages 361 and 265 of the same record, and which only authorized him to contract for space for May or June sailing. Our statement that the information that the vessel would sail in June was undoubtedly obtained from libelant's officers, is based upon the testimony of Mr. Davis that all the information he had on that subject, was obtained from libelant's officers (Apostles, 331).

We also adhere to our statement criticized at page 42 of Reply Brief for Libelant, that both Davis and respondent treated the contract as one for "June sailing". This statement is to be found at page 61 of Brief for Appellees and is supported by the testimony there cited from the Apostles. The correspondence cited by libelant, in fact, the whole file introduced by libelant, clearly shows that respondent was arranging for shipping space to meet its requirements by months—and we so stated.

At various places in its Reply Brief libelant has indulged in abuse and insulting references to respondent. While such references are generally made for the purpose of prejudicing an opponent's case, they are, we believe, the weakest form of argument. At any rate, our sense of dignity and our respect for this justly distinguished Court, has dictated that we be not also transgressors in that regard, and we have, therefore, passed those matters unnoticed.

Though the law as to the incompetency of parol evidence to vary a written instrument, where reformation is not sought or a mistake is not pleaded, is too well settled to require authorities, we may remark that while such evidence may show what the parties meant by what they said, it cannot be used to show that they meant something different from what they said. Yet that is just what libelant is trying to do when it argues that "June loading" or "Cacique June loading" meant loading sometime after the Cacique had made a voyage to various Oriental ports and returned a second time to San Francisco.

In its Opening Brief, appellant urged that this appeal constituted a hearing de novo, and that amendments should be permitted to the libel and additional evidence received. No specific request was made, however. While the power of this Court in such matters, upon a proper showing and in a meritorious case was unquestioned, we showed in the Brief for Appellees that the exercise of the

Court's discretion is subject to certain salutary limitations, which apply with particular force to the instant case. Respondent also objected to any amendment or additional evidence because libelant had not applied for such relief within the time permitted by the Rules of this Court. Respondent earnestly objected, additionally, on the ground that by such proceeding or amendment respondent would suffer material injury and prejudice in its rights. At the oral argument, no express application was made for permission to amend the libel, or to introduce new or other evidence, but because libelant had been granted the privilege of filing an additional brief, proctor for respondent stated to the Court and to proctor for libelant, that it was our understanding that this case would be heard upon the record as it then stood and without amendment or additional evidence. Proctor for libelant, either actually or impliedly assented to that understanding and will not, we believe, now be permitted, after oral argument, to ask for such relief. It is true that libelant does not actually ask for such privilege, but it does assert in its latest brief, that it would be entitled to that relief if the Court shall take a view different from that of libelant upon certain propositions of law. Proctor for libelant has cited no law permitting this practice and we know of none. Rule 7 of the Rules in Admiralty of this Court, permits new allegations or new proof only upon application made within fifteen days after filing of the record and then upon four days' no-

tice. Respondent would object to any amendment of the libel, or the introduction of new evidence or the withdrawal of evidence or admissions made in the District Court. As before stated, appellant has not definitely made such request, but its Reply Brief contains several references to the propriety of such course and on page 50, proctor for libelant asserts the right to withdraw his admission in the District Court, that the case must stand or fall upon the breaches alleged to have occurred prior to the filing of the libel.

ANSWER TO THE ARGUMENT THAT THE LIBEL SHOULD NOT HAVE BEEN DISMISSED.

The last few pages of the Reply Brief are devoted to the contention that the dismissal should not have been ordered. Apparently the theory is that though the cause of action failed, the action should survive.

This question was considered at pages 64 and following of Brief for Appellees. The anticipatory breach, as charged in the libel, was disproved because the evidence showed that if a breach was tendered, it was not accepted, but expressly rejected by libelant and part performance under the contract was, thereafter, accepted. The actual breach claimed in this Court could not have occurred because the time for performance had not arrived when the libel was filed. If a breach after suit were possible, such breach was expressly waived for the purposes

of this action (Apostles, 451). There was, therefore, no case and no possibility of a case, against respondent and the libel should of right have been dismissed.

We respectfully submit that the decree of the District Court should be affirmed.

Dated, San Francisco,
November 28, 1921.

W. F. Williamson,
Proctor for Appellees.